ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 98-192
Direct Access to the	)	File No. 60-SAT-ISP-97
INTELSAT System	)	

To: The Commission

COMMENTS OF COLUMBIA COMMUNICATIONS CORPORATION

Columbia Communications Corporation ("Columbia"), by counsel and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby comments on the Commission's *Notice of Proposed Rulemaking*, FCC 98-280, slip op. (released October 28, 1998) ("*Notice*") in the above-captioned proceedings. Columbia submits these comments to address two of the major issues upon which the Commission sought comment in the *Notice* — the competitive concerns raised by direct access to INTELSAT, and the potential effect that direct access would have on U.S. efforts to privatize INTELSAT.

STATEMENT OF INTEREST

Columbia is a U.S. small business with principal corporate offices in Bethesda, Maryland and Honolulu, Hawaii. It is one of only three U.S.-based international satellite operators that compete directly with INTELSAT in the international fixed-satellite service ("FSS") market. Columbia provides its service by operating C-band commercial capacity on two

National Aeronautics and Space Administration ("NASA") Tracking and Data Relay Satellite System ("TDRS") satellites pursuant to FCC authorizations and under terms of a unique revenue sharing agreement with NASA. Columbia also sells capacity on its own satellite, Columbia 515, obtained through an agreement with INTELSAT.

Columbia has used the limited C-band capacity on the TDRS satellites to carve a unique niche for itself in the international FSS market by offering innovative, low-cost services that focus primarily on trans-oceanic communications in the Atlantic and Pacific Regions. Nonetheless, throughout its history, Columbia has suffered significant disadvantages as a result of INTELSAT's treaty-based status, privileges and immunities, broad market share, and ability to restrict competition in overseas markets. Accordingly, Columbia is very concerned that granting INTELSAT unfettered direct access to the U.S. market would broaden and perpetuate its legal and market advantages to the detriment of Columbia and other private satellite service providers.

SUMMARY OF MAJOR POINTS[1/]

Access to the U.S. market must only be granted to INTELSAT if it is privatized in a pro-competitive manner that affirmatively subjects it, or a successor entity, to U.S. competition regulation and other U.S. laws, and if the foreign markets in which its Signatories operate are opened fully to other international satellite service providers on terms consistent with the World Trade Organization Agreement on Basic Telecommunications ("WTO Agreement"). Absent such

---

1/ In the *Notice*, the Commission requested that all comments, regardless of length, contain a short, concise summary of the substantive arguments raised. *See Notice*, FCC 98-280, slip op. at 31 (¶ 64) & n.159.

reform, INTELSAT remains a behemoth that possesses unbounded privileges and immunities, as well as the fundamental capability to distort competition globally due to its broad power across virtually all markets.

Last year, the U.S. Government clearly stated in connection with the finalization of the WTO Agreement that the U.S. would not grant market access to an INTELSAT spin-off if its entry would have anti-competitive results. This commitment necessarily encompasses, and applies more strongly to, U.S. market entry by INTELSAT itself. Given these assurances, which simply underscore long-standing U.S. policies, Columbia finds it startling that the Commission is apparently contemplating allowing INTELSAT access to the U.S. market without any commitments or concessions on INTELSAT's part. INTELSAT must be subject to a full analysis of the competitive consequences of granting U.S. market entry before authority to operate in the United States can be granted. At a minimum, if the Commission permits some form of direct access, INTELSAT should be required to waive its immunity from lawsuits filed in U.S. courts, as well as its exemption from all forms of local, state and federal taxation.

Moreover, handing over the valuable prize of U.S. market access without reform of INTELSAT could be a powerful disincentive to the pro-competitive privatization of the organization — both for INTELSAT and for many of its key participating Signatories. Once direct access is bestowed, the United States will have substantially less leverage with which to influence the privatization negotiations taking place within INTELSAT.

DISCUSSION

Response to Query No. 3 — Competitive Concerns Raised By Direct Access

In the *Notice*, the Commission observed that such unlikely confederates as Comsat and PanAmSat have argued that the direct entry into the U.S. international satellite services market by INTELSAT, with its privileges and immunities intact, would have adverse consequences for competition in the marketplace. *See Notice* at ¶ 57. In particular, these parties have maintained that the inability of U.S. regulatory authorities to exercise adequate oversight of INTELSAT's rate setting and competitive practices poses a significant threat to existing competitors. *Id.*

Columbia has supported the goal of direct access, but agrees strongly with the assessment of these commenters that it must not be granted without fundamental changes in INTELSAT's structure and legal status. In its present form, INTELSAT is a behemoth that possesses the fundamental capability to distort not just the competitive balance in a single national market, but the broad power to undermine competition globally due to its privileged status and broad power across virtually all markets. Approximately 140 countries are members of INTELSAT and each has a Signatory entity with a vested interest in the use of INTELSAT satellite capacity based on its receipt of revenues in proportion to system use in the Signatory's country. Unlike Comsat, the U.S. Signatory, which is a publicly traded company subject to substantial government regulation, most of these other Signatory entities are government-affiliated carriers that are themselves national regulatory entities. Thus, these entities have the

monetary incentive and the regulatory power to deny market access to companies that compete with INTELSAT.

Early last year, during the final negotiations concerning the WTO Agreement, the United States Trade Representative sent a letter to Columbia and the other separate satellite system operators to address concerns that affiliates of INTELSAT might be unintended beneficiaries of the WTO Agreement. This letter clarified that INTELSAT and Inmarsat (the International Mobile Satellite Organization) were not beneficiaries of the WTO Agreement, stating unambiguously that "the United States will not grant market access to a future privatized affiliate, subsidiary or other form of spin-off from the ISOs, that would likely lead to anti-competitive results." *See* Attachment, Letter from Charlene Barshefsky, United States Trade Representative-Designate, to Kenneth Gross, President and Chief Operating Officer, Columbia Communications Corp., dated February 12, 1997, at 2 ("Barshefsky Letter"). This language necessarily encompasses a pledge that U.S. market entry by INTELSAT itself would be subject to similar treatment, including a full analysis of the competitive consequences of market entry, before any authority to operate in the United States would be granted. Indeed, the Commission made such a pledge in its 1997 *DISCO II Order*.[2/]

2/ *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States,* 12 FCC Rcd 24094, 24141-50 (1997) (*"DISCO II Order"*). Specifically, the Commission stated that the administration "will not permit market access to a *future* privatized affiliate, subsidiary, or other form of spin-off from an IGO that would likely lead to anticompetitive results."

With its direct access proposal, however, the Commission is suggesting that it may now grant direct U.S. market access to INTELSAT, possibly without the type of thorough scrutiny of the competitive impact of such a step that was contemplated in the Barshefsky Letter and the *DISCO II Order*. The U.S. market is the largest, most lucrative, and most robust telecommunications market in the world. Given all that is at stake, and the Government's long-standing attentiveness to issues surrounding U.S. market entry for intergovernmental satellite organizations and their affiliates, Columbia finds it startling that the Commission is now apparently contemplating allowing INTELSAT access to the U.S. market without any commitment, new conditions, or concessions on INTELSAT's part. Such a step would be anathema to basic free market principles.

Consistent with its previous policy declarations, the Commission therefore should require that INTELSAT make, either in this proceeding or a separate application proceeding, an affirmative demonstration that its entry into the U.S. market as a provider of service directly to end users will not have an adverse impact on competition. Indeed, the INTELSAT spin-off New Skies Satellites, N.V., which controls ***less than one-third*** the total capacity of INTELSAT, is appropriately being required to satisfy the DISCO II competitive impact standard in connection with numerous applications to modify authorizations for U.S. earth stations that have been previously authorized to access satellites transferred from INTELSAT to New Skies.[3/]

3/ *See Requests for Special Temporary Authority to Operate on INTELSAT Satellites Transferring to New Skies, N.V.*, DA 98-2431, slip op. (released November 30, 1998).

Columbia believes that an appropriate showing justifying U.S. market entry can only be made if INTELSAT is substantially restructured, and shorn of its quasi-governmental character and its ability to impede market access by other competitors. These are the types of issues being addressed in the New Skies proceeding, and would clearly be even more relevant with respect to INTELSAT. In the absence of pro-competitive privatization, however, the only appropriate course would be to deny Intelsat access to the U.S. market until each of its Signatory nations permits market access by end users to all of the international satellite systems with which INTELSAT competes. Otherwise, INTELSAT will be able to exploit the combination of new access to the U.S. market with its market advantages abroad to undermine competition and enhance its monopoly profits on non-competitive routes between the United States.

Post-direct-access efforts to influence INTELSAT through the earth station licensing process would be ineffective, as a vast number of operators are already authorized to communicate via INTELSAT satellites, accessing the space segment through Comsat. Once this restriction has been removed, and INTELSAT has established direct relationships with end-users in the United States, any action to limit anti-competitive conduct by INTELSAT would necessitate disruption of these relationships, which the Commission has been loath to do in the past. Mere suspension of the processing of new earth station applications for access to INTELSAT satellites would have little impact given the already large number of facilities that may use INTELSAT satellites as points of communication.

In the event that the Commission nonetheless proceeds to permit INTELSAT to obtain U.S. market access, it should, at a minimum, require INTELSAT to execute a full waiver

of its privileges and immunities concurrent with any agreements to sell space segment directly to any user for service to or from the United States. Specifically, **INTELSAT would be required to waive its immunity from lawsuits filed in U.S. courts as well as its exemption from all local, state and federal taxation, including taxes on its assets and on its revenues earned in the U.S. market.**

Response to Query No. 4 — Impact of Direct Access on Efforts to Privatize INTELSAT

As indicated above, handing over the valuable prize of the U.S. market without reforms of INTELSAT could be a powerful disincentive to the pro-competitive privatization of the organization — both for INTELSAT and for key participating Signatories in the organization. Once direct access is bestowed, the United States will have substantially less leverage with which to influence the privatization negotiations taking place within INTELSAT. Accordingly, the prerogative of access to the U.S. market must not be given free of conditions, in a way that leaves the United States with little or no ability to push for a positive resolution of the privatization process. This valuable right should only be given to INTELSAT once it has completed the process of privatizing in a manner that will not distort competition in the marketplace for international satellite services.

If privatization is mishandled or unduly delayed, there will be a competitive distortion in the marketplace that will impede the continued emergence of robust competition, either by stalling full competition among the full range of available service providers or, even worse, by unleashing an ineffectively privatized INTELSAT into an otherwise competitive

marketplace. The Commission must carefully consider the consequences of such a situation before it acts on the proposal advanced in the *Notice*.

CONCLUSION

For the foregoing reasons, Columbia respectfully urges the Commission to refrain from permitting INTELSAT to directly access the U.S. market until the issue of the organization's privatization and associated issues of potential anti-competitive impact are resolved. Undue haste in changing the current regulatory treatment of INTELSAT could have long-lasting negative repercussions. U.S. market access must only be granted to INTELSAT following privatization if the terms of that restructuring affirmatively subject the successor entity to U.S. competition regulation and other U.S. laws, and the foreign markets in which its owners (Signatories) operate are opened fully to other international satellite service providers on terms consistent with the WTO Agreement.

Respectfully submitted,

COLUMBIA COMMUNICATIONS CORPORATION

By: _____

Raul R. Rodriguez
David S. Keir

Leventhal, Senter & Lerman, P.L.L.C.
2000 K Street, N.W., Suite 600
Washington, D.C. 20006
(202) 429-8970

December 22, 1998

Its Attorneys

ATTACHMENT

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C. 20508

FEB 12 1997

Mr. Kenneth Gross
President and Chief Operating Officer
Columbia Communications
7200 Wisconsin Avenue, N.W.
Suite 701
Bethesda, Maryland 20814

Dear Mr. Gross:

I am writing in reply to a letter of January 31, 1997, from your legal counsel, regarding the negotiations on basic telecommunications services at the World Trade Organization. The U.S. goal in these negotiations is to strengthen the ability of the U.S. satellite services industry to compete globally, and on a level playing field, with the inter-governmental satellite services organizations and with satellite service providers of other countries.

The United States has taken a number of steps to make certain that our key trade partners provide market access for satellite-based delivery of basic telecom services. Based on a note issued by the chairman of the negotiations in November, 1996, which has become part of the formal record of the proceedings, we have clarified the scheduling approach with regard to satellites. As a result, close to forty countries have made offers that would provide full market access for satellite-based delivery of all scheduled services, on an immediate or phased-in basis.

WTO members that make specific commitments on satellites will be subject to allocating and assigning frequencies in accordance with the principles of most-favored-nation and national treatment, as well as in accordance with the requirement for domestic regulations in the General Agreement on Trade in Services. Almost all of the countries making full satellite commitments have also adopted the reference paper on pro-competitive regulatory commitments. As a result, they will be obligated to provide additional regulatory safeguards with respect to allocation and use of radio frequencies.

A successful agreement on basic telecom services would also obligate those countries which have not made satellite commitments to provide treatment no less favorable to satellite service providers of the United States than the treatment provided to service suppliers of other countries. This would apply, for example, to how WTO members reach decisions regarding new market access arrangements involving service suppliers of other countries.

I share your deep concern regarding the possible distortive impact on competition in the U.S. satellite services market of certain proposals for restructuring INTELSAT. The United States has proposed a restructuring of INTELSAT that would lead to the creation of an independent commercial affiliate, INTELSAT New Corporation (INC). If made independent, the United

States believes that the creation of INC will enhance competition and help ensure the continuation of INTELSAT's mission of global connectivity for core services. As you are aware, however, many INTELSAT members are resisting the idea of independence for INC and we believe that a failure to achieve independence could adversely affect competition in the U.S. satellite services market. In the WTO negotiations we have taken pains to preserve our ability to protect competition in the U.S. market.

Our legal conclusion, for which there is a consensus among participants in the WTO negotiations, is that the ISOs do not derive any benefits from a GBT agreement because of their status as treaty-based organizations. The status of ISOs was discussed in detail in the GBT multilateral sessions. No delegation in the GBT negotiations has contested this conclusion.

We have also concluded that the United States cannot be forced to grant a license to a privatized ISO (should the ISO change its treaty status and incorporate in a country) or to a future privatized affiliate, subsidiary or other form of spin-off from the ISO. Existing U.S. communications and antitrust law, regulation, policy and practice will continue to apply to license applicants if a GBT deal goes into effect. Both Department of Justice and FCC precedent evidence long-standing concerns about competition in the U.S. market and actions to protect that competition. We have made it clear to all our negotiating partners in the WTO that the United States will not grant market access to a future privatized affiliate, subsidiary or other form of spin-off from the ISOs, that would likely lead to anti-competitive results.

It has always been U.S. practice to defend vigorously any challenge in the WTO to allegations that U.S. measures are inconsistent with our WTO obligations. There is no question that we would do the same for any FCC decision to deny or condition a license to access an ISO or a future privatized affiliate, subsidiary or other form of spin-off from the ISO. For your information, Section 102(c) of the Uruguay Round Agreements Act, specifically denies a private right of action in U.S. courts on the basis of a WTO agreement. Therefore, a FCC decision is not subject to judicial review in U.S. courts based upon a WTO agreement, such as the General Agreement on Trade in Services.

The United States is confident that it would win if a U.S. decision went to WTO dispute settlement. If the United States did not prevail, however, we would not allow trade retaliation measures to deter us from protecting the integrity of U.S. competition policy.

I appreciate the support your firms' representatives have expressed for our objectives in the WTO negotiations.

Sincerely,

Charlene Barshefsky
United States Trade Representative-Designate

cc: Chairman Reed Hundt, Federal Communications Commission

FCC Secretary William F. Caton for inclusion in the rulemaking proceeding concerning the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States (FCC 96-210, released May 14, 1996)

Daniel S. Goldberg, Counsel to PanAmSat

Raul R. Rodriguez, Counsel to Columbia Communications Corporation

April McClain-Delaney, Counsel to Orion Network Systems, Inc.